

AMENDED IN SENATE MAY 27, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

**ASSEMBLY BILL**

**No. 987**

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**Introduced by Assembly Member Levine**  
**(Coauthor: Assembly Member Dodd)**

February 26, 2015

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An act to amend Section 12940 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL’S DIGEST

AB 987, as amended, Levine. Employment—~~discrimination~~, *discrimination*: unlawful employment practices.

Existing law, the California Fair Employment and Housing Act, protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment without discrimination, abridgment, or harassment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

Existing ~~law~~, *law* requires an employer or other entity covered by the act to provide reasonable accommodation of, among other things, a person’s disability and religious beliefs and prohibits discrimination against any person because the person has opposed any practices forbidden under the act or because the person has filed a complaint.

This bill would, in addition, prohibit an employer or other covered entity from retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted. The bill would make related findings and declarations.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. The Legislature finds and declares the following:

2 (a) A request for reasonable accommodation based on religion  
3 or disability constitutes protected activity under ~~Government Code~~  
4 ~~Section 12940~~, *12940 of the Government Code*, such that when a  
5 person makes such a request, he or she is protected against  
6 retaliation for making the request.

7 (b) The Legislature recognizes that federal law affords similar  
8 protection to a person making such a request, as articulated by the  
9 Equal Employment Opportunity Commission in its interpretative  
10 guidance of the Americans with ~~Disability~~ *Disabilities* Act of 1990  
11 (Public Law 101-336) and Title VII of the Civil Rights Act of 1964  
12 (Public Law 88-352, as amended). The Legislature affirms that  
13 the federal acts provide a floor of protection and that this state's  
14 law has always exceeded in the protections afforded.

15 (c) The law of this state contains similar protections for a person  
16 making a request for reasonable accommodation under the  
17 Pregnancy Disability Leave Law (Section 12945 of the Government  
18 Code) and the California Family Rights Act (Sections 12945.2 and  
19 19702.3 of the Government Code). It is the intent of the Legislature  
20 for the protections afforded a person making a request for  
21 accommodation on the basis of religion or disability to be  
22 consistent with the provisions of the Fair Employment and Housing  
23 Act (Part 2.8-~~Commencing~~ *commencing* with Section 12900) of  
24 Division 3 of Title 2 of the Government ~~Code~~. *Code*.

25 (d) Notwithstanding any interpretation of this issue in *Rope v.*  
26 *Auto-Chlor Sys. of Washington, Inc.*, (2013) 220 Cal. App. 4th  
27 635, the Legislature intends (1) to make clear that a request for  
28 reasonable accommodation on the basis of religion or disability is  
29 a protected activity, and (2) by enacting paragraph (2) of  
30 subdivision (m) and paragraph (4) of subdivision (l) of Section  
31 12940, to provide protection against retaliation when an individual  
32 makes a request for reasonable accommodation under these  
33 sections, regardless of whether the request was granted. With the  
34 exception of its holding on this issue, *Rope v. Auto-Chlor Sys. of*  
35 *Washington, Inc.*, (2013) 220 Cal. App. 4th 635 remains good law.

1 SEC. 2. Section 12940 of the Government Code is amended  
2 to read:

3 12940. It is an unlawful employment practice, unless based  
4 upon a bona fide occupational qualification, or, except where based  
5 upon applicable security regulations established by the United  
6 States or the State of California:

7 (a) For an employer, because of the race, religious creed, color,  
8 national origin, ancestry, physical disability, mental disability,  
9 medical condition, genetic information, marital status, sex, gender,  
10 gender identity, gender expression, age, sexual orientation, or  
11 military and veteran status of any person, to refuse to hire or  
12 employ the person or to refuse to select the person for a training  
13 program leading to employment, or to bar or to discharge the  
14 person from employment or from a training program leading to  
15 employment, or to discriminate against the person in compensation  
16 or in terms, conditions, or privileges of employment.

17 (1) This part does not prohibit an employer from refusing to  
18 hire or discharging an employee with a physical or mental  
19 disability, or subject an employer to any legal liability resulting  
20 from the refusal to employ or the discharge of an employee with  
21 a physical or mental disability, where the employee, because of  
22 his or her physical or mental disability, is unable to perform his  
23 or her essential duties even with reasonable accommodations, or  
24 cannot perform those duties in a manner that would not endanger  
25 his or her health or safety or the health or safety of others even  
26 with reasonable accommodations.

27 (2) This part does not prohibit an employer from refusing to  
28 hire or discharging an employee who, because of the employee's  
29 medical condition, is unable to perform his or her essential duties  
30 even with reasonable accommodations, or cannot perform those  
31 duties in a manner that would not endanger the employee's health  
32 or safety or the health or safety of others even with reasonable  
33 accommodations. Nothing in this part shall subject an employer  
34 to any legal liability resulting from the refusal to employ or the  
35 discharge of an employee who, because of the employee's medical  
36 condition, is unable to perform his or her essential duties, or cannot  
37 perform those duties in a manner that would not endanger the  
38 employee's health or safety or the health or safety of others even  
39 with reasonable accommodations.

1 (3) Nothing in this part relating to discrimination on account of  
2 marital status shall do either of the following:

3 (A) Affect the right of an employer to reasonably regulate, for  
4 reasons of supervision, safety, security, or morale, the working of  
5 spouses in the same department, division, or facility, consistent  
6 with the rules and regulations adopted by the commission.

7 (B) Prohibit bona fide health plans from providing additional  
8 or greater benefits to employees with dependents than to those  
9 employees without or with fewer dependents.

10 (4) Nothing in this part relating to discrimination on account of  
11 sex shall affect the right of an employer to use veteran status as a  
12 factor in employee selection or to give special consideration to  
13 Vietnam-era veterans.

14 (5) (A) This part does not prohibit an employer from refusing  
15 to employ an individual because of his or her age if the law  
16 compels or provides for that refusal. Promotions within the existing  
17 staff, hiring or promotion on the basis of experience and training,  
18 rehiring on the basis of seniority and prior service with the  
19 employer, or hiring under an established recruiting program from  
20 high schools, colleges, universities, or trade schools do not, in and  
21 of themselves, constitute unlawful employment practices.

22 (B) The provisions of this part relating to discrimination on the  
23 basis of age do not prohibit an employer from providing health  
24 benefits or health care reimbursement plans to retired persons that  
25 are altered, reduced, or eliminated when the person becomes  
26 eligible for Medicare health benefits. This subparagraph applies  
27 to all retiree health benefit plans and contractual provisions or  
28 practices concerning retiree health benefits and health care  
29 reimbursement plans in effect on or after January 1, 2011.

30 (b) For a labor organization, because of the race, religious creed,  
31 color, national origin, ancestry, physical disability, mental  
32 disability, medical condition, genetic information, marital status,  
33 sex, gender, gender identity, gender expression, age, sexual  
34 orientation, or military and veteran status of any person, to exclude,  
35 expel, or restrict from its membership the person, or to provide  
36 only second-class or segregated membership or to discriminate  
37 against any person because of the race, religious creed, color,  
38 national origin, ancestry, physical disability, mental disability,  
39 medical condition, genetic information, marital status, sex, gender,  
40 gender identity, gender expression, age, sexual orientation, or

1 military and veteran status of the person in the election of officers  
2 of the labor organization or in the selection of the labor  
3 organization's staff or to discriminate in any way against any of  
4 its members or against any employer or against any person  
5 employed by an employer.

6 (c) For any person to discriminate against any person in the  
7 selection, termination, training, or other terms or treatment of that  
8 person in any apprenticeship training program, any other training  
9 program leading to employment, an unpaid internship, or another  
10 limited duration program to provide unpaid work experience for  
11 that person because of the race, religious creed, color, national  
12 origin, ancestry, physical disability, mental disability, medical  
13 condition, genetic information, marital status, sex, gender, gender  
14 identity, gender expression, age, sexual orientation, or military  
15 and veteran status of the person discriminated against.

16 (d) For any employer or employment agency to print or circulate  
17 or cause to be printed or circulated any publication, or to make  
18 any nonjob-related inquiry of an employee or applicant, either  
19 verbal or through use of an application form, that expresses,  
20 directly or indirectly, any limitation, specification, or discrimination  
21 as to race, religious creed, color, national origin, ancestry, physical  
22 disability, mental disability, medical condition, genetic information,  
23 marital status, sex, gender, gender identity, gender expression,  
24 age, sexual orientation, or military and veteran status, or any intent  
25 to make any such limitation, specification, or discrimination. This  
26 part does not prohibit an employer or employment agency from  
27 inquiring into the age of an applicant, or from specifying age  
28 limitations, where the law compels or provides for that action.

29 (e) (1) Except as provided in paragraph (2) or (3), for any  
30 employer or employment agency to require any medical or  
31 psychological examination of an applicant, to make any medical  
32 or psychological inquiry of an applicant, to make any inquiry  
33 whether an applicant has a mental disability or physical disability  
34 or medical condition, or to make any inquiry regarding the nature  
35 or severity of a physical disability, mental disability, or medical  
36 condition.

37 (2) Notwithstanding paragraph (1), an employer or employment  
38 agency may inquire into the ability of an applicant to perform  
39 job-related functions and may respond to an applicant's request  
40 for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental

1 disability, medical condition, genetic information, marital status,  
2 sex, gender, gender identity, gender expression, age, sexual  
3 orientation, or military and veteran status, to harass an employee,  
4 an applicant, an unpaid intern or volunteer, or a person providing  
5 services pursuant to a contract. Harassment of an employee, an  
6 applicant, an unpaid intern or volunteer, or a person providing  
7 services pursuant to a contract by an employee, other than an agent  
8 or supervisor, shall be unlawful if the entity, or its agents or  
9 supervisors, knows or should have known of this conduct and fails  
10 to take immediate and appropriate corrective action. An employer  
11 may also be responsible for the acts of nonemployees, with respect  
12 to sexual harassment of employees, applicants, unpaid interns or  
13 volunteers, or persons providing services pursuant to a contract in  
14 the workplace, where the employer, or its agents or supervisors,  
15 knows or should have known of the conduct and fails to take  
16 immediate and appropriate corrective action. In reviewing cases  
17 involving the acts of nonemployees, the extent of the employer's  
18 control and any other legal responsibility that the employer may  
19 have with respect to the conduct of those nonemployees shall be  
20 considered. An entity shall take all reasonable steps to prevent  
21 harassment from occurring. Loss of tangible job benefits shall not  
22 be necessary in order to establish harassment.

23 (2) The provisions of this subdivision are declaratory of existing  
24 law, except for the new duties imposed on employers with regard  
25 to harassment.

26 (3) An employee of an entity subject to this subdivision is  
27 personally liable for any harassment prohibited by this section that  
28 is perpetrated by the employee, regardless of whether the employer  
29 or covered entity knows or should have known of the conduct and  
30 fails to take immediate and appropriate corrective action.

31 (4) (A) For purposes of this subdivision only, "employer" means  
32 any person regularly employing one or more persons or regularly  
33 receiving the services of one or more persons providing services  
34 pursuant to a contract, or any person acting as an agent of an  
35 employer, directly or indirectly, the state, or any political or civil  
36 subdivision of the state, and cities. The definition of "employer"  
37 in subdivision (d) of Section 12926 applies to all provisions of this  
38 section other than this subdivision.

39 (B) Notwithstanding subparagraph (A), for purposes of this  
40 subdivision, "employer" does not include a religious association

1 or corporation not organized for private profit, except as provided  
2 in Section 12926.2.

3 (C) For purposes of this subdivision, “harassment” because of  
4 sex includes sexual harassment, gender harassment, and harassment  
5 based on pregnancy, childbirth, or related medical conditions.  
6 Sexually harassing conduct need not be motivated by sexual desire.

7 (5) For purposes of this subdivision, “a person providing services  
8 pursuant to a contract” means a person who meets all of the  
9 following criteria:

10 (A) The person has the right to control the performance of the  
11 contract for services and discretion as to the manner of  
12 performance.

13 (B) The person is customarily engaged in an independently  
14 established business.

15 (C) The person has control over the time and place the work is  
16 performed, supplies the tools and instruments used in the work,  
17 and performs work that requires a particular skill not ordinarily  
18 used in the course of the employer’s work.

19 (k) For an employer, labor organization, employment agency,  
20 apprenticeship training program, or any training program leading  
21 to employment, to fail to take all reasonable steps necessary to  
22 prevent discrimination and harassment from occurring.

23 (l) (1) For an employer or other entity covered by this part to  
24 refuse to hire or employ a person or to refuse to select a person  
25 for a training program leading to employment or to bar or to  
26 discharge a person from employment or from a training program  
27 leading to employment, or to discriminate against a person in  
28 compensation or in terms, conditions, or privileges of employment  
29 because of a conflict between the person’s religious belief or  
30 observance and any employment requirement, unless the employer  
31 or other entity covered by this part demonstrates that it has explored  
32 any available reasonable alternative means of accommodating the  
33 religious belief or observance, including the possibilities of  
34 excusing the person from those duties that conflict with his or her  
35 religious belief or observance or permitting those duties to be  
36 performed at another time or by another person, but is unable to  
37 reasonably accommodate the religious belief or observance without  
38 undue hardship, as defined in subdivision (u) of Section 12926,  
39 on the conduct of the business of the employer or other entity  
40 covered by this part. Religious belief or observance, as used in



1 this section, includes, but is not limited to, observance of a Sabbath  
2 or other religious holy day or days, reasonable time necessary for  
3 travel prior and subsequent to a religious observance, and religious  
4 dress practice and religious grooming practice as described in  
5 subdivision (q) of Section 12926. This subdivision shall also apply  
6 to an apprenticeship training program, an unpaid internship, and  
7 any other program to provide unpaid experience for a person in  
8 the workplace or industry.

9 (2) An accommodation of an individual's religious dress practice  
10 or religious grooming practice is not reasonable if the  
11 accommodation requires segregation of the individual from other  
12 employees or the public.

13 (3) An accommodation is not required under this subdivision  
14 if it would result in a violation of this part or any other law  
15 prohibiting discrimination or protecting civil rights, including  
16 subdivision (b) of Section 51 of the Civil Code and Section 11135  
17 of this code.

18 (4) For an employer or other entity covered by this part to, in  
19 addition to the employee protections provided pursuant to  
20 subdivision (h), retaliate or otherwise discriminate against a person  
21 for requesting accommodation under this subdivision, regardless  
22 of whether the request was granted.

23 (m) (1) For an employer or other entity covered by this part to  
24 fail to make reasonable accommodation for the known physical  
25 or mental disability of an applicant or employee. Nothing in this  
26 subdivision or in paragraph (1) or (2) of subdivision (a) shall be  
27 construed to require an accommodation that is demonstrated by  
28 the employer or other covered entity to produce undue hardship,  
29 as defined in subdivision (u) of Section 12926, to its operation.

30 (2) For an employer or other entity covered by this part to, in  
31 addition to the employee protections provided pursuant to  
32 subdivision (h), retaliate or otherwise discriminate against a person  
33 for requesting accommodation under this subdivision, regardless  
34 of whether the request was granted.

35 (n) For an employer or other entity covered by this part to fail  
36 to engage in a timely, good faith, interactive process with the  
37 employee or applicant to determine effective reasonable  
38 accommodations, if any, in response to a request for reasonable  
39 accommodation by an employee or applicant with a known physical  
40 or mental disability or known medical condition.

1 (o) For an employer or other entity covered by this part, to  
2 subject, directly or indirectly, any employee, applicant, or other  
3 person to a test for the presence of a genetic characteristic.

4 (p) Nothing in this section shall be interpreted as preventing the  
5 ability of employers to identify members of the military or veterans  
6 for purposes of awarding a veteran's preference as permitted by  
7 law.

O